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BAR BULLETIN

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"NEIGHBORHOOD" LAW OFFICES

In Philadelphia, groups of lawyers are trying an experiment that will be viewed askance by members of the bar generally. Under the supervision of the "Neighborhood Law Office Committee," six offices have been set up in as many sections of the city, each staffed with from three to six attorneys, and to be kept open during the day and evening. It is emphasized that there will be no advertising other than publicity "directed to the general community, informing the community of the type of service rendered in neighborhood offices operating under the plan."

There is an advisory committee composed of lawyers and laymen who will observe the progress of the experiment and report thereon. It is stated that this committee has been formed without regard to affiliation with any bar association. The profits, if any, are to be divided among participants in the several office groups, and losses shared by the partners. If the experiment works out as its sponsors anticipate, it is said other offices will be opened under the form of agreement adopted.

It is not made clear what the advantages to the public will be from such a service, except to make it convenient for a citizen to consult a lawyer day or evening without loss of time in traveling to down town law offices. It is assumed that the sponsors think there is a large and undeveloped need for legal services among persons who feel that the law is a luxury far beyond their means and who, for that reason, may fail to assert legal rights, or seek legal advice in connection with their businesses.

Ignoring the Act of the Legislature repealing the State Bar Act, and another Act admitting all students of approved law schools to the Bar, the Supreme Court of Oklahoma promulgated rules on October 10, to create, control, regulate and integrate the Bar of that State. This vigorous assertion of inherent power was taken on an original petition filed by the president of the old integrated bar, and other prominent Oklahoma lawyers. Many local bar associations in the State also filed petitions. This action of the highest State court is a strong assertion of the "inherent power" of the court to determine the qualifications for admission to the Bar, when qualifications are lacking, and when the privilege of practicing has been forfeited.

ASSOCIATION OFFICERS FOR 1940 NOMINATED

NOMINATION for 1940 officers and trustees of the Los Angeles Bar Association have been announced by the nominating committee of fifteen, elected at the November meeting of the Association members as follows:

President: Herbert Freston.

Senior Vice-President: J. C. Macfarland.

Junior Vice-President: George M. Breslin.

Trustees from among active members of the Association: Ewell D. Moore, Jerold E. Weil, Alexander Macdonald, William C. Mathes.

Trustees from among affiliated members of the affiliated Associations: Arthur L. Erb, of the Beverly Hills Bar Association; Frederick F. Houser, of the San Gabriel Bar Association.

The Nominating Committee consisted of James C. Ingebretsen, W. Joseph McFarland, Jack W. Hardy, Paul R. Hutchinson, Lewis T. Sterry, Michael G. Luddy, Vere Radir Norton, Harold W. Schweitzer, Grant B. Cooper, Maurice C. Sparling, Frank S. Balthis, Jr., Hiram E. Casey, J. W. McKinley, Milo V. Olson and Raphael Dechter.

Additional nominations may be made by petition filed in accordance with the by-laws. Members will ballot on the nominees and the ballots will be counted on January 15, 1940. The new officers and trustees so chosen will be installed at a meeting of members to be held on the fourth Thursday in February, 1940.

O TEMPORA! O TAXES!

In language most languorous and rich
We now condemn the seductive cliche,
Although we know not what it was,
We still condemn it, just because
It came down from our grandpas.

The years of ease and days of grace
That came before this dizzy pace;
Days with low taxes and great riches,
Of mighty men and seductive
(Well, all right, cliches)
Are now bound with legal stiches.

Taxes will come but none will go;
Legislators will make it so.
But safe in his salaried niche,
Behind some new seductive cliche
The legislator *his* tax will ditch.

—WILLIAM A. SHERWIN.

CHRISTMAS JINKS

IT would be an anti-climax adequately to review the "Bar Jinks," which delighted a capacity audience of 600 on December 9 at the Breakfast Club. However, THE BULLETIN thinks recognition of the '39 Jinks Committee's task in selecting and rehearsing a large cast; in writing, staging and producing a fast-moving, witty, snappy show, should be made through its columns. As for the actors, male and female, from the mayor and the judges, down through a large list of well-known members of the Bar, they knew their lines and acted the roles without the least selfconsciousness. The two Kens—Ken Chantry, the producer, and Ken Browne, the director, did a remarkably successful job. To single out any one "skit" or any one "actor" would be unfair to many others. One striking fact impressed the audience—the number of handsome, talented women lawyers who took part in the show.

The master of ceremonies is such an important person in the successful production of a show of the character of "Atrocities of 1939," that THE BULLETIN makes special mention of the work of Frank Belcher in that capacity. It is hoped that no radio scouts were present, else the bar might lose one of its distinguished members.

In the order of their appearances on the stage, following is a list of those who appeared in the long cast of characters, some of whom took part in more than one sketch: Frank B. Belcher, Allen W. Ashburn, Lowell Matthey, Louis L. Clarke, Jr., Miss Delphine Meyers, Judge John Beardsley, William M. Rains, Max M. Gilford, Miss Constance Glass, Joseph A. Ball, Joe Crider, Jr., Julius Patrosso, Judge Clement D. Nye, Paul R. Hutchinson, Jud Crary, Nathan O. Freedman, Herman F. Selvin, Miss Grace Cooper, Grant B. Cooper, George M. Breslin, Michael G. Luddy, Miss Jeanette Crop, Karl W. Marks, Miss Anna Zacsek, Miss Helen King, Judge Alfred H. Paonessa, Judge Oda Faulconer, Judge Georgia P. Bullock, Robert E. Ford, Judge A. A. Scott, Mayor Fletcher Bowron, Judge Emmet H. Wilson, Miss Constance Glass, Elliott H. Pentz.

The show was staged under the supervision of Kenneth N. Chantry, with Joe E. Marks, stage manager. The Jinks Committee, to whose members thanks is due, comprised the following: Lowell Matthay, chairman; James C. Ingebretsen, vice-chairman; Marcus A. Mattson, Herman Selvin, Robert E. Ford, Frank B. Belcher, Paul W. Sampsell, Paul R. Hutchinson, Richard C. Heaton, E. Avery Crary IV, Augustus F. Mack, John Eley, Jr., George M. Breslin.

IMPLIED WARRANTIES IN THE CALIFORNIA FOOD CASES—A MARE'S NEST*

By Lee G. Paul, of the Los Angeles Bar

THERE are few fields of the law more cluttered up with conflicting decisions than that encompassing implied warranties on the sale of food products. The opportunity to lay further stumbling blocks in the path of sound judicial reasoning arises whenever anyone, injured as a result of eating unwholesome food, seeks to recover damages in the courts from one, usually the manufacturer or processor, with whom he has had no contractual dealings. It is well settled, both in California and elsewhere, under such circumstances, that an action for negligence may be brought directly against the manufacturer.[1] Negligence, however, often presented difficulties of proof in the food cases. As a result attorneys representing plaintiffs have generally preferred to proceed against the manufacturer or processor on the theory of a violation of an implied warranty of fitness or merchantability in addition to or in lieu of an action for negligence.

Until recently the California courts, following the weight of authority, held that privity of contract between plaintiff and defendant was essential to a cause of action for breach of an implied warranty in the food cases.[2] A dictum delivered by the Supreme Court in 1938,[3] indicated, however, that such privity might not be required in this state. The suggestion resulted in a number of conflicting decisions,[4] and on September 6, 1939, the Supreme Court in the case of *Klein v. Duchess Sandwich Company, Ltd.*,[5] settled the question by declaring that under the provisions of the Uniform Sales Act, a warranty of fitness of foodstuffs for human consumption runs in favor of all ultimate consumers, irrespective of whether they are in privity of contract with the warrantor.[6]

The *Klein* case, as an examination of the authorities relied upon by the Court will disclose, is a clear instance of judicial legislation. In addition, unfortunately, the decision merely removes the roots of conflict from one field of the law of implied warranties to plant them in another. For a preview of the harvest one has but to turn to the food cases.

ORIGIN OF IMPLIED WARRANTIES IN THE FOOD CASES

It is believed that implied warranties first arose in connection with a vendor's title to goods offered for sale.[7] The implied warranty of quality followed, but according to Williston was not developed until the opening years of the Nineteenth century.[8] Blackstone's Commentaries, published in 1765, contain the

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*Contest article.

[1]*Dryden v. Continental Baking Co.*, 11 C. (2d) 33. The authorities are collected in the following A. L. R. notes: 88 at 527, 105 at 1502, 111 at 1242.

[2]*Binon v. Sasaki*, 5 C. A. (2d) 15; *Medley v. Schmid*, Memo Decis., App. Div. L. A. Sup. Ct., No. Civ. A. 3819.

[3]*Dryden v. Continental Baking Co., supra.*

[4]*Jensen v. Berris*, 31 Cal. App. (2d) 537; *Fulton v. Weber Baking Co., Ltd.*, L. A. Superior Court No. 369691. Opinion of Judge Willis reprinted in *The Los Angeles Daily Journal*, for 11-4-38.

[5]98 Cal. Dec. 215.

[6]The writer filed a brief *amicus curiae* in support of a petition for rehearing in the case. Rehearing was denied Oct. 6, 1939.

[7]1 Street, *Foundations of Legal Liability* (1906) 383; 8 Holdsworth, *History of Eng. Law* (1926) 70.

[8]1 *Williston on Sales* (2d ed. 1924), 440, Sec. 228.

statement without citation of authority that, "* * * in contracts for provisions it is always implied that they are wholesome * * *."[9] This would seem to indicate that in the case of food products implied warranties of quality were in good standing many years earlier. It is generally believed, however, that Blackstone based his dictum upon ancient statutes rendering common dealers in victuals criminally liable for selling corrupt foodstuffs.[10] Such statutes are referred to in two decisions rendered by the Court of Exchequer in 1847 and 1862 respectively.[11] Neither case, however, interprets the early statutes as imposing absolute criminal liability on vendors of deleterious food products. Indeed the report of the later decision contains arguments and citations by counsel which indicates that knowledge of unwholesomeness on the part of the vendor at the time of sale was required to violate the statute. With respect to civil actions for breach of an implied warranty of quality on the sale of foodstuffs, both cases held that the rule of *caveat emptor* obtained except when a sale was made by a common dealer in victuals for immediate domestic consumption. Under these circumstances the purchaser could recover back the price paid for the foodstuffs.

Irrespective then of what liability may have been imposed on vendors of inferior food in early times under the criminal law, it is unlikely, in civil suits against this class of vendors, that the implied warranty of quality was recognized as a basis for action until the Nineteenth century. It should not be forgotten, however, that at early common law neither innkeepers nor common dealers in victuals were regarded as insurers of the quality of the food dispensed or sold.[12]

When the Sale of Goods Act was passed in England in 1893, the existing common law rules regulating sales were codified. Implied warranties were embraced by the act but no specific provision was made to apply to sales of food products.[13] Privity of contract was, of course, essential to the existence of all warranties and the English courts have not seen fit to depart from this rule, in order to confer a right of action upon a remote purchaser of "goods," whether food or something else.[14]

In view of the orderly development of the law in England there is reason to ask why the conflict exists in the American authorities over whether privity of contract is essential to give rise to an implied warranty in the food cases.

The doctrine that the manufacturer of an article inherently dangerous to human life could be sued for negligence by a remote purchaser was introduced into the United States in 1852, when the New York Court of Appeals held that a manufacturing druggist who mislabeled poison as a harmless drug could be sued in tort by a remote purchaser.[15] The extension and liberalization of this exception to the general rule that a contractor cannot be held liable for negligence to third persons injured as a result of a breach of contract is now too well known to the members of the bar to require comment here.[16]

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[9] 3 Comm. (Lewis' ed. 1898) 166.

[10] *Farrell v. Manhattan Market Co.* (Mass. 1908) 84 N. E. 481; *Wright v. Hart*, 18 Wend. (N. Y.) 449 at 463; 1 Williston 478, Sec. 341.

[11] *Burnby v. Bollett*, 16 M. & W. 644; *Emmerton v. Mathews*, 7 H. & N. 586.

[12] *Valeri v. Pullman Co.* (D. C. N. Y. 1914) 218 Fed. 519; *Ketterer v. Armour & Co.* (C. C. A. 2d, 1917) 247 Fed. 921.

[13] 1 Williston, 482 *et seq.*, Sec. 242a.

[14] *Grant v. Australian Knitting Mills* (1936) A. C. 85; 105 A. L. R. 1483. See *Daniels and Wife v. White & Sons* (1938) 4 All. E. R. 258, 82 Sol. Jo. 912. See *Donoghues Case* (1932) A. C. 562.

[15] *Thomas v. Winchester*, 6 N. Y. (2 Selden) 397.

[16] For a discussion of the exception, see Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 L. Q. Rev. 343. See also 40 Harv. L. Rev. 886.

Its importance to the subject matter of this paper rests on the fact that manufacturers of foodstuffs were early included as a class to which the exception was applicable.[17] A surprising number of courts have had difficulty ever since in recognizing the distinction between an action against a manufacturer for negligence and one basing right of recovery on a breach of an implied warranty of quality.[18] Some of the decisions, while noting and paying lip service to the requirement of privity of contract attempt to circumvent the rule in the food cases by creating a warranty of quality which runs with the article like a covenant running with the land.[19] Others have usurped a legislative function and simply declared that a manufacturer of food "impliedly warrants" its fitness for human consumption to all consumers.[20] Still others have held that the consumer is the third party beneficiary of the original contract between the dealer and the manufacturer.[21]

It is apparent that no basis exists in reason or justice for dispensing with the requirement of contractual privity to grant a right of action on an implied warranty against a manufacturer of food, and insisting on such privity before permitting a similar action to lie against manufacturers of other classes of "inherently dangerous articles."[22] That courts which have created an exception in the food cases may find this argument embarrassing is illustrated by a recent Michigan decision,[23] in which it was declared that while the court was committed by earlier decisions to the view that privity of contract was not essential to suit on an implied warranty in this class of cases, nevertheless, it would not be led further afield by extending the application of the exception.

While a minority of jurisdictions permit suit against a manufacturer of foodstuffs for breach of an implied warranty in the absence of privity of contract, the weight of authority declares that to sustain a finding of breach of warranty, express or implied, there must be evidence of a contract between the parties litigant, for without a contract there can be no warranty.[24] In the majority rule jurisdictions it is pointed out further that all warranties are incidents of the law of sales and cannot properly be attributed to a manufacturer who has never had any contractual relationship with the person claiming the benefit of the warranty.[25] The suggestion that warranties on the sale of chattels may run with the article sold, as covenants run with the land, is dismissed as wholly contrary to all established doctrines of the common law,[26] and little space is required in the opinions to dispose of arguments that there may be an implied warranty for the benefit of a third party.[27]

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[17]*Bishop v. Weber* (Mass. 1885), 1 N. E. 154; *Tomlison v. Armour & Co.* (N. J. 1908) 70 Atl. 314; *Kitterer v. Armour & Co., supra,* note 12.

[18]*Hertzler v. Manshum* (Mass. 1924), 200 N. W. 155; *Catani v. Swift & Co.* (Pa. 1915), 95 Atl. 931; *Parks v. Yost Pie Co.* (Kan. 1914), 144 Pac. 202.

[19]*Chenault v. Houston Coca Cola Bottling Co.* (Miss. 1928), 118 So. 177. See, *Ward v. Morehead City Sea Food Co.* (N. C. 1916) 87 S. E. 958.

[20]*Davis v. Van Camp Packing Co.* (Ia. 1920), 176 N. W. 382; *Catani v. Swift & Co., supra,* note 18; *Jackson Coca-Cola Bottling Co. v. Chapman* (Miss. 1914) 64 So. 791.

[21]*Ward Baking Co. v. Trizzino* (Ohio 1928) 161 N. E. 557. See also dissenting opinion in *Thomason v. Ballard & Ballard Co.* (N. C. 1935) 179 S. E. 30 at 34.

[22]1 Williston 490, Sec. 244.

[23]*Smolenski v. Libby, McNeill & Libby* (Mich. 1937) 273 N. W. 587.

[24]*Roberts v. Anheuser Busch Brewing Assoc.* (Mass. 1912) 98 N. E. 95; *Welshaven v. Charles Parker Co.* (Conn. 1910) 76 Atl. 271.

[25]*Connecticut Pie Co. v. Lynch* (C. A. D. C. 1932) 57 F. (2d) 447; *Turner v. Edison Storage Battery Co.* (N. Y. 1928) 161 N. E. 423.

[26]*Chysky v. Drake Bros. Co., Inc.* (N. Y. 1923) 139 N. E. 576; *Pelletier v. Dupont* (Me. 1925) 128 Atl. 186; *Birmingham Chero-Cola Bottling Co. v. Clark* (Ala. 1921) 89 So. 64; *Nelson v. Armour Packing Co.* (Ark. 1905) 90 S. W. 288.

[27]*Pearlman v. Garrod Shoe Co., Inc.* (N. Y. 1937) 11 N. E. (2d) 718; *Gimenez v. Great Atlantic & Pac. Tea Co.* (N. Y. 1934) 191 N. E. 27.

EFFECT OF THE UNIFORM SALES ACT

Adoption of the Uniform Sales Act placed further obstacles in the way of courts which disapproved of the requirement of contractual privity in connection with the implied warranty of quality.

The Sales Act was modeled closely upon the English Sales of Goods Act, and Section 15, governing implied warranties of quality, was taken, as its American author points out, "nearly verbatim" from the English Act.[28] As previously noted the English Statute merely codified the common law implied warranty rule which placed food in the same general category with other "goods," and consequently no special provision was made in the Sales Act to apply to sales of food products. Section 15 (Civil Code, Sec. 1735), provides in part that:

> "*Implied Warranties of Quality.* Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> (1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relied on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grocer or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality * * *."[29]

In those food cases where the courts have considered the Sales Act in relation to implied warranties of quality it has been recognized generally that there can be no such warranties except as provided for by the Act.[30] These courts also hold that implied warranties arise only as between a buyer and a seller, and do not attach to or run with the article sold.[31]

Decisions in the food cases have not been uniform in all Sales Act jurisdictions, however, despite the declared policy of the Act.[32] This would seem to be due to the fact that some courts either overlook or ignore the application of Section 15 to sales of food products.[33] The confusion is likely to continue at least until it is recognized that all implied warranties of quality, including those applicable to sales of foodstuffs, are governed by the provisions of Section 15. Since the decision in *Klein v. Duchess Sandwich Company, Ltd.*, the troubles in this field in California are of a different order.

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[28] 1 Williston 440, Sec. 227.

[29] For an analysis of the sections applicable to the food cases read *Ryan v. Progressive Grocery Stores* (N. Y. 1931) 175 N. E. 105.

[30] *Rinaldi v. Mohican Co.* (N. Y. 1918) 121 N. E. 471; *Hoback v. Coca Cola Bottling Wks. of Nashville* (Tenn. 1936) 98 S. W. (2d) 113; *Gearing v. Berkson* (Mass. 1916) 111 N. E. 785; *Chysky v. Drake Bros. Co. supra*, note 26.

[31] *Prinsen v. Russos* (Wis. 1927) 215 N. W. 905; *Minutilla v. Providence Ice Cream Co.* (R. I. 1929) 144 Atl. 884. See *State v. Consol. Gas etc.* (Md. 1922) 126 Atl. 105.

[32] "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it." Sec. 74 (Civil Code, Sec. 1794.)

[33] The Sales Act should have governed in the following cases, among others: *Anderson v. Tyler* (Ia. 1937) 274 N. W. 48; *Hertzler v. Manshum, supra*, note 18; *Ward Baking Co. v. Trizzino, supra*, note 21.

THE FOOD CASES IN CALIFORNIA UNDER COMMON LAW

Most of the decisions in California dealing with implied warranties have been rendered in recent years. As early as 1855, however, the Supreme Court declared that warranties of merchantability would be implied on the sale of personal property only under established exceptions to the common law rule of *caveat emptor,* saying:

> "* * * A warranty will not be implied, except in cases where goods are sold at sea, when the party has no opportunity to examine them, or in the case of a sale by sample, or of provisions for domestic use."[34]

The cases which followed showed no disposition on the part of the California courts to depart from settled principles of the common law. For example, it was held that warranties do not run with a chattel on its resale,[35] and that in the absence of contractual privity there could be no recovery against the manufacturer of an inherently dangerous article except in tort.[36]

In 1872 when California adopted its first Civil Code, specific provision was made in Section 1775 for implied warranties of soundness and wholesomeness to arise on sales of provisions. The section read as follows:

> "One who makes a business of selling provisions for domestic use warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome."

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[34] *Moore v. McKinlay & Garioch,* 5 Cal. 471.

[35] *Pezel v. Yerex,* 56 C. A. 304.

[36] *Cliff v. Calif. Spray Chem. Co.,* 83 C. A. 424; *Lewis v. Terry,* 111 Cal. 39.

The law as thus established was merely a codification of the common law rule under which common dealers in victuals were deemed as a matter of law to warrant foodstuffs sold for immediate domestic use to be wholesome and fit to eat. The liability imposed would seem to have been that of a true warranty and absolute. Curiously enough, however, only two cases were reported under the code section in the 59 years that elapsed between its enactment and its repeal.[37] Less remarkable in view of the difficulties of proof, but still impressive, is the fact that no decisions appear in the books for the same period involving suits for negligence against dealers, manufacturers or processors of foodstuffs.

THE FOOD CASES IN CALIFORNIA UNDER THE SALES ACT

The food cases reported in California since the adoption of the Sales Act in 1931, may be classified in three groups. *First:* Suits for breach of implied warranties brought by buyers against their immediate sellers. *Second:* Suits for breach of implied warranties brought by persons other than buyers against restaurant keepers, dealers, or manufacturers with whom they have had no contractual dealings. *Third:* Suits to recover for negligence in the manufacture or preparation of food.

This paper is concerned with the second group of cases, for with respect to the first, liability is settled under the Sales Act,[38] and with respect to the third, recovery is permitted in California as it is elsewhere even in the absence of privity of contract under the well recognized extension of the inherently dangerous article rule.[39]

Prior to the Supreme Court's decision in the case of *Dryden v. Continental Baking Co.*, it appeared to be settled in this state that implied warranties on sales of food stuffs ran only to immediate purchasers.[40] In the *Dryden* case plaintiff, a married woman, sued the defendant baking company to recover damages allegedly sustained as a result of eating bread manufactured by the defendant in which particles of glass were imbedded. Plaintiff's husband purchased the bread from a neighborhood grocery store which in turn had procured it from the defendant. The complaint contained two counts, one for negligence in the preparation of the bread, and the other for breach of warranty. The trial court found there was a breach of warranty running to the plaintiff and also that defendant was guilty of negligence. The District Court of Appeal affirmed the judgment, and the Supreme Court on hearing in bank did likewise, but placed its holding solely on the ground that defendant was negligent. A dictum was delivered, however, on the wife's right to maintain an action for breach of warranty against the defendant. "Assuming that privity (of contract) is an essential element of such action," said the Court, "it might well be urged that the wife, under the circumstances here disclosed, was a third party beneficiary of the contract."

It is notable that the court makes no reference in its opinion to the provisions of the Sales Act, but it is unlikely that Act was overlooked as the District Court of Appeal considered it at length.[41] Be that as it may, however, the dictum that privity of contract between the wife and the bakery company

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[37] *Laucks v. Morley*, 39 C. A. 570; *Gindraux v. Maurice Mercantile Co.*, 4 Cal. (2d) 206. Neither case has any bearing on the subject matter of this paper.

[38] *Mix v. Ingersoll Candy Co.*, 6 Cal. (2d) 674.

[39] *Dryden v. Continental Baking Co.*, 11 Cal. (2d) 683, *supra*, note 1.

[40] See cases cited in note 2.

[41] 67 P. (2d) 686.

might be established by viewing the wife as the third party beneficiary of her husband's purchase contract with the neighborhood grocer, is still decidedly vulnerable. In addition to ignoring the fact that there was no contractual relationship between the husband and the baking company to support an implied warranty in his favor, the court also disregarded the provisions of the Civil Code section 1559 requiring enforceable third party beneficiary contracts to be made *expressly* for the benefit of the third party. This section, as the cases have held, limits recovery by a third person to those contracts which indicate by direct terms that such was the intent of the parties, and does not permit the intent to be inferred merely from the fact that third persons are incidentally benefitted if the contract is performed.[42] The dictum in the *Dryden* case indicated one of two things, either the implied warranty phase of the decision was ill-considered or the court was serving notice that obvious fictions might be employed in the food cases to avoid the generally accepted requirement of privity of contract. That the Appellate Courts took the latter view would seem clear from the decisions that followed.

In the case of *Jensen v. Berris,*[43] plaintiff, a member of a ladies pinochle club, met for lunch at defendant's restaurant with other members of the society. Plaintiff was the guest of another member who paid all the club checks, in accordance with a custom under which each club member paid in rotation for the regular club luncheons. Plaintiff developed symptoms of food poisoning

[42] *Chung Kee v. Davidson,* 73 Cal. 522; *Mottashed v. Central Pac. Improvmt. Co.,* 8 C. A. (2d) 256.

[43] 31 Cal. App. (2d) 537.

and sued the restaurant owner both for negligence and for breach of an implied warranty. The trial court held for defendant on the negligence count but rendered judgment against him on the implied warranty.

On appeal the defendant contended that there was no contractual privity with the plaintiff and, that not having paid for her meal she was not a "buyer" as that term is used in Civil Code Section 1735. The argument was rejected, the court holding that appellant had made a separate contract with each member of the club when the respective meals were ordered and served and that "* * * the mere making of the contract was sufficient to give rise to the warranty of reasonable fitness." With respect to plaintiff's position as a "buyer," the court said, "having taken an order from respondent and pursuant thereto having served the food it does not lie in the mouth of appellant to deny privity between himself and respondent because she did not individually and personally offer him the purchase price in payment for the meal." As authorities for its conclusions the court cited the dictum in the *Dryden* decision and a Mississippi case where the court advanced, but specifically refused to rely upon, similar reasoning to uphold judgment in favor of a plaintiff whose friend bought and paid for a bottle of contaminated coca cola.[44]

The *Jensen* decision was followed by *Klein v. Duchess Sandwich Company, Ltd.*[45] In this case a husband entered K's restaurant and purchased a ham and cheese sandwich sealed in waxed paper, which he delivered to his wife who was seated in an automobile outside. The sandwich so sealed had been sold to K. about an hour previously by the Duchess Sandwich Company. The wife partially devoured the sandwich and then discovered it was wormy. Mental disturbances followed and the wife and her husband sued the company, as well as K., for breach of an implied warranty of fitness, and for negligence. The trial court directed a verdict in favor of defendants on both counts and plaintiffs appealed. The District Court of Appeal reversed the judgment on the ground that the husband was the agent of his wife in purchasing the sandwich and hence that an implied warranty ran from the company in her favor. The Supreme Court granted a hearing.

The Sandwich Company urged that there was no evidenec introduced at the trial from which it could be found that it was negligent in the manufacture of the sandwich, and further that in the absence of privity of contract there could be no implied warranty of quality running from it to the plaintiffs.

On the question of negligence the court stated it was error to direct a verdict in the Company's favor because the presenct of worms in the sealed sandwich, without more, supported an inference that the Company had been negligent.

In connection with the necessity for privity of contract between plaintiffs and the Sandwich Company to give rise to an implied warranty, the court referred to the conflict in the authorities, and cited a number of cases in Sales Act jurisdictions for the view that, in the case of foodstuffs, there is an exception to the general rule that privity of contract is required to support a cause of action for breach of warranty.[46] Public policy was admitted to afford a background for these decisions and the court declared that, "* * * the

[44]*Coca-Cola Bottling Works v. Lyons,* 111 So. 305.

[45]98 Cal. Dec. 215, *supra,* note 5.

[46]It is interesting to note that the cases cited by the court either were decided before the Sales Act had been adopted in the particular jurisdictions, passed on the implied warranty question without reference to the Sales Act, or were concerned solely with actions for negligence.

remedies of an injured consumer of unwholesome food ought not to be made to depend 'upon the intricacies of the law of sales,' and the warranty of the manufacturer to such consumer should not be made to rest solely on privity of contract." The Sales Act was held to support this conclusion, the court saying, "In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the Legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict 'privity of contract' would be essential to bringing of an action by such ultimate consumer for an asserted breach of the implied warranty."

In answer to the Sandwich Company's argument that the wife was precluded from recovery because she was not the "buyer," the court stated that the wife in sending her husband into the restaurant for the express purpose of purchasing the sandwich "* * * was thus in effect the 'buyer' within the terms of the statute." The cases of *Jensen v. Berris* and *Dryden v. Continental Baking Co., supra,* were cited by the court as authorities for this proposition.

Irrespective of how much one's social or epicurean sensibilities may applaud the Supreme Court's efforts to avoid the "intricacies of the law of sales," and thereby provide all injured consumers of deleterious food with a right of action for breach of implied warranty, lawyers will recognize that the rule of the *Klein* case is open to criticism on several grounds. First, it fails to conform to the rule adopted by the great weight of authority under the Sales Act, thereby violating the spirit of uniformity of decision behind the statute. Second, it

creates an exception to the law of implied warranties which cannot properly be restricted to sales of foodstuffs, thereby causing uncertainty and confusion in connection with implied warranties arising upon sales of other classes of merchandise, particularly those which, like food, may be included within the ever widening category of "articles inherently dangerous to human life." Finally, the rule should be criticized because it relies upon obvious fictions to distort the law of sales, and conceal the fact that it is judicial legislation.

Few lawyers today will deny that under our system of jurisprudence judges have, and in some cases should exercise, the right to make new law through what actually amounts to judicial legislation. The late Justice Cardozo has sounded the following note of warning, however, in connection with the exercise of this right:

> "They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law."[47]

It is clear, under Judge Cardozo's standards, that the law enacted by the Supreme Court to govern implied warranties in the food cases cannot be supported as judicial legislation. This is true irrespective of one's views on whether the language of the Sales Act is sufficiently vague to leave a gap in the provisions affecting implied warranties, for if such a gap did exist, the court had, and ignored, an express mandate from the legislature as to how it should be filled.

The demands of social justice furnish no excuse for this violation of law because with the decision in the *Dryden* case, *supra*, it was settled in this state that plaintiffs proceeding under a negligence theory to recover damages from a manufacturer or processor of food have the benefit of the doctrine of *res ipsa loquitur* and, are no longer required to assume the conventional burden of proof. Furthermore, proof by the manufacturer that he exercised "more than ordinary care" in the preparation of his product, is not sufficient to dispel the inference of negligence which will take the case to the jury. Under the rules of evidence, consequently, the demands of justice may be met as fully by a cause of action for negligence as by one for breach of implied warranty.

It should be recognized that the liability of a warrantor is that of an insurer and absolute. Liability without fault, however, always opens a fertile field for planting false or exaggerated claims. To abolish the requirement of contractual privity in connection with the right to sue for breach of an implied warranty is to make this field available to all comers. The rule of law laid down in the *Klein* case is, therefore, to be condemned not only because it is unsound as a matter of law, but also because it will encourage fraud. Whether the rule can or will be restricted to sales of food products remains to be seen.

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[47] *The Nature of the Judicial Process*, p. 129.

THE CALIFORNIA AND FEDERAL WAGE AND HOUR LAWS*

By Leslie C. Tupper, of the Los Angeles Bar

THE decision of the United States Supreme Court upholding the Washington minimum wage law,[1] the resulting revival of enforcement of the California minimum wage law[2] and the enactment by Congress of the Fair Labor Standards Act of 1938,[3] make appropriate a re-examination of minimum wage and maximum hour legislation in this state and a discussion of the relationship between the state and federal legislation on this subject.

REGULATION OF HOURS OF WORK

The right of a state, in the exercise of its police power, to restrict the number of hours an employee may work was recognized by the United States Supreme Court in 1898 when the court approved a Utah statute which regulated the hours of labor for men working in mines.[4]

In California, the only hour law applicable to men and women in general is that which provides that no employer shall cause his employees to work more than six days in seven.[5] Several statutes prescribe maximum hours in certain lines of work such as on public works,[6] trainmen and train dispatchers,[7] workers in underground mines and smelters[8] and pharmacists.[9]

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*Contest Article.

[1]*West Coast Hotel v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 Sup. Ct. Rep. 578 (1938).

In 1914 the Oregon Supreme Court sustained the validity of the Oregon Minimum Wage Law. *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914). On appeal to the U. S. Supreme Court Justice Brandeis disqualified himself because he had taken part in the preparation of the brief. The remaining justices were equally divided and accordingly the judgment of the Oregon Supreme Court was affirmed. *Stettler v. O'Hara*, 243 U. S. 629, 61 L. ed. 937, 37 Sup. Ct. Rep. 475 (1917). In 1923 the District of Columbia minimum wage law was held unconstitutional. *Adkins v. Childrens Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. 394 (1923). In 1925 the Arizona law came before the court which held in a memorandum opinion that it was bound by its decision in the Adkins case. *Murphy v. Sardell*, 296 U. S. 530, 70 L. ed. 396, 46 Sup. Ct. 22 (1925). The Arkansas law was subjected to the same treatment in 1927. *Donham v. West Nelson Mfg. Co.*, 273 U. S. 657, 71 L. ed. 825, 47 Sup. Ct. Rep. 343 (1927). The New York law was given extended treatment and invalidated in 1936. *Morehead v. People ex. rel. Tipaldo*, 298 U. S. 587, 80 L. ed. 1347, 56 Sup. Ct. 918, 103 A. L. R. 1445 (1936). A year later the court reversed itself. *West Coast Hotel v. Parrish, supra.* All of these cases were concerned with minimum wage laws for women.

[2]In the past year several convictions for violation of the law have been obtained in San Francisco and Los Angeles. (Information obtained from Division of Industrial Welfare.)

Acknowledgment is made for information relative to the practice and orders of the Industrial Welfare Commission kindly furnished by Mrs. Cooley and Miss Flannigan of the Los Angeles office of the Division of Industrial Welfare.

[3]52 Stat. 1060 (1938), 29 U. S. C. Supp. IV, sec. 201 (1938).

[4]*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

[5]Lab. C. sec. 552. A violation of this section is a misdemeanor. Sec. 553. The same is true of all labor code sections which provide a penalty for violation.

[6]Lab. C. secs. 1810-1816; Calif. Const. Art. XX, sec. 17½. Unless otherwise specified the sections referred to in notes 7 to 41 following are sections of the Labor Code of California as amended in 1939.

[7]Secs. 601-607.

[8]Secs. 750-752. The statute on which these sections are based was enacted in 1909, (Stats. 1909 p. 279) and limited such work to eight consecutive hours. That statute was held constitutional in 1909. *In re Martin*, 157 Cal. 51, 26 L. R. A. (N. S.) 242, 106 Pac. 235 (1909). *In re Martin*, 157 Cal. 60, 106 Pac. 239 (1909).

[9]Secs. 850-856. The statute on which these sections are based, Stats. 1905, p. 28 was held constitutional in *In re Twing*, 183 Cal. 261, 204 Pac. 1082 (1922).

The hours which minors may work are regulated in detail by provisions of the Labor Code[10] and of the School Code.[11] Generally, in those occupations in which a minor may be employed[12] he is prohibited from working more than eight hours in one day or more than forty-eight hours in one week; nor may he work before five o'clock in the morning or after ten o'clock in the evening.[13]

The hours of work for women are limited to eight hours in one day and to forty-eight hours in one week in certain industries by section 1350 of the Labor Code.[14] This statute was first enacted in 1911[15] and was held constitutional by the United States Supreme Court as applied to women working in hotels[16] and as applied to women working in hospitals.[17]

The California Industrial Welfare Commission, as will be noticed later, has authority to fix the maximum hours of work for women and minors engaged in any occupation, trade or industry in the state.[18] Pursuant to this authority the

[10]Secs. 1290-1311.

[11]Sch. Code secs. 1.130-1.290 (Compulsory Education Law).

[12]A minor under 16 cannot be employed in any dangerous or immoral occupation. Sec. 1308. This section is based upon former Penal Code secs. 272 and 273 which were upheld in *In re Weber*, 149 Cal. 392, 86 Pac. 809 (1906).

[13]Sec. 1391. The statute on which this section is based was held constitutional. *In re Spencer*, 146 Cal. 396, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105, 86 Pac. 896.

An insurer under the workmens compensation act is not liable for injuries to a minor employed contrary to the terms of the Child Labor Law when it insures only those legally employed. *Maryland Casualty Co. v. Industrial Accident Commission*, 179 Cal. 716, 178 Pac. 858. Compare *Williams v. Southern Pacific Co.*, 173 Cal. 525, 160 Pac. 660.

[14]The establishments listed in the statute are manufacturing, mechanical, or mercantile, laundry, cleaning, dyeing, or cleaning and dyeing, hotel, public lodging house, apartment house, hospital, beauty shop, barber shop, place of amusement, restaurant, cafeteria, telegraph or telephone, in the operation of elevators in office buildings, and express or transportation company in California. The exceptions are set out in sec. 1352. Employers subject to the law are required to keep records showing name and actual hours worked by all female employees. Sec. 1353.

[15]Stats. 1911 p. 437.

[16]*Miller v. Wilson*, 236 U. S. 373, L. R. A. 1915 F. 829, 59 L. ed. 628, 35 Sup. Ct. Rep. 342 (1915).

[17]*Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345 (1915).

[18]Sec. 1182(b).

Commission has fixed maximum of eight hours in one day and forty-eight hours in one week for women engaged in certain occupations not mentioned in section 1350. These include specified women employees in the fish canning industry,[19] nut cracking and sorting industry,[20] dry fruit packing industry,[21] in general and professional offices,[22] and all women in unclassified occupations.[23]

As a result of the provisions of Labor Code section 1350 and the provisions of the Commission's orders there are very few industries, trades or occupations in California in which hours of labor for women are not limited to some extent.[24]

WAGES

There is no minimum wage law in California governing all types of workers. The only minimum wage law which affects adult males is the Public Wage Rate Law.[25] Under this law all workmen employed on public works, exclusive of maintenance, must be paid not less than the general prevailing rate of per diem wages paid for work of a similar character in the locality in which the public work is performed.[26] The law was held constitutional on the ground that the state as the employer having full control of the terms and conditions under which it will contract may, through its legislature provide what wage shall be paid to its employees.[27]

California was one of the first states to adopt a minimum wage law applicable to women and minors. The present law is based on the original statute enacted in 1913[28] largely through the efforts of Katherine Philips Edson.[29] The law is administered by the Division of Industrial Welfare, which is a division in the

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[19]Order No. 6a. The order permits longer hours in certain branches of industry if extra compensation paid.

[20]Order No. 15a.

[21]Order 8a. Women in citrus and green fruit and vegetable packing industries may work longer than eight hours if extra compensation is paid.

[22]Order No. 9. Adult women, not subject to the Eight Hour Law for Women (Labor Code sec. 1350) receiving more than $30 a week may be employed more than 48 hours per week in emergency; those receiving less may be employed more than 48 hours in an emergency if they are paid time and one-half the regular rate.

[23]Order No. 10a. The order defines "unclassified occupations" to mean *all* employment not classified under the mercantile, manufacturing, millinery, hotel and restaurant, laundry and dry cleaning, fruit and vegetable canning, fruit and vegetable packing, fish canning and telephone and telegraph industries, office or professional occupations, domestic labor, or the harvesting, curing or drying of any variety of fruit or vegetables, and the cracking and sorting of nuts.

[24]Although not of the same type of legislation notice may be taken of statutes which regulate the time of day when a business may be open. Such legislation has been upheld when the public safety or health required it; *Ex parte Moynier,* 65 Cal. 33, 2 Pac. 728 (1884); *In re Wong Wing,* 167 Cal. 109, 138 P. 695, 51 L. R. A. (N. S.) 361 (1914); *In re Lowenthal,* 92 C. A. 200, 267 Pac. 886 (1928); *In re Gatsios,* 95 Cal. App. 762, 273 Pac. 826 (1928); but not when the restrictions are not related to an appropriate exercise of the police power. *Skaggs v. City of Oakland,* 6 Cal. (2d) 222, 57 Pac. (2d) 478 (1936); *Ganley v. Claeys,* 2 Cal. (2d) 266, 40 Pac. (2d) 817 (1935).

[25]Secs. 1770-1781.

[26]Sec. 1771.

[27]*Metropolitan Water Dist. v. Whitsett,* 215 Cal. 400, 10 Pac. (2d) 751 (1932), upholding statute as it stood before incorporated in Labor Code. The comparable federal act is the Bacon-Davis Act, 46 Stat. 1494, 40 U. S. C. Sec. 276a (1936). See, also, Walsh-Healy Act, 49 Stats. 2036 (1936) 4 U. S. C. 35 (Supp. 1938). This type of act was held constitutional in *Atkin v. Kansas,* 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124 (1903).

[28]Stats. 1913 p. 632. The original law is substantially the same as the present one. When it passed the law the legislature was in doubt of its constitutional power to enact such legislation, and accordingly passed an amendment to the constitution granting power to enact it. The amendment was adopted by popular vote in November, 1914 and is now sec. 17½ of Article XX of the Constitution. See Commons and Associates, *Hist. of Labor in U. S.,* 1896-1932, 513-515 (1935).

[29]See Beyer, *History of Labor Legislation For Women in Three States,* p. 128 (1929).

Department of Industrial Relations. In the Division is the Industrial Welfare Commission, which consists of five members appointed by the governor, at least one of which must be a woman.[30]

No provision in the law fixes any minimum wage. If the Industrial Welfare Commission, after investigation, concludes that in any occupation, trade or industry, the wages paid to women and minors are inadequate to supply "the cost of proper living," or the hours or conditions of labor are prejudicial to the health, morals or welfare of the employees the Commission calls a conference, termed a "wage board", composed of an equal number of representatives of employers and employees in the business in question and a representative of the Commission who acts as chairman.[31] The members of the wage board are allowed five dollars per day and traveling expenses.[32] It is the duty of the wage board to investigate and to make findings and recommendations with respect to minimum wage, maximum hours and standard conditions of labor.[33] Then the Commission may, after a public hearing had on its own motion or upon petition, fix (a) a minimum wage for women and minors which shall not be less than a wage adequate to supply the necessary cost of proper living to, and maintain the health and welfare of such women and minors; (b) maximum hours of labor consistent with the health and welfare of women and minors and not to be more than the "maximum now or hereafter fixed by law"; (c) the standard conditions of labor demanded by the health and welfare of women and minors.[34]

A woman or minor paid less than the minimum wage fixed by the Commission may recover, in a civil action, the unpaid balance of the wage and costs of

[30]Sec. 70.
[31]Sec. 1179.
[32]Sec. 1180.
[33]Sec. 1181.
[34]Sec. 1182, Secs. 1183-1186 provide for notice and hearing and for publications of its orders. Sec. 1187 makes findings of fact by the Commission, in the absence of fraud, conclusive. Provision for rehearing is made in secs. 1188 and 1189. Sec. 1190 provides for court review of orders and rulings.

The Division of Industrial Welfare states that wage boards have always been summoned before orders were issued by the Commission. However, a reading of sections 1182 and 1184 leaves a doubt whether the calling of a wage board is mandatory. Section 1186, which gives the commission power, after public hearing, to rescind, alter or amend any prior order, makes no reference to the necessity of calling a wage board.

suit, "notwithstanding any agreement to work for a lesser wage".[35] The Division of Industrial Welfare is authorized to investigate complaints and take all steps necessary to enforce payment of the minimum wage.[36] An employer violating an order of the Commission is guilty of a misdemeanor and subject to a fine of not less than fifty dollars or imprisonment for not less than thirty days or both.[37]

Pursuant to the statute the Commission has issued orders governing minimum wages, maximum hours of labor and standard conditions of labor for the mercantile industry,[38] the manufacturing industry,[39] laundry and dry-cleaning industry,[40] fish canning industry,[41] fruit and vegetable packing industry,[42] nut cracking and sorting industry,[43] hotels and restaurants,[44] unclassified occupations,[45] fruit and vegetable canning industry,[46] and general and professional offices.[47] In addition the Commission has issued two orders governing maximum hours, overtime compensation and conditions of labor in the motion picture industry,[48] and an order containing sanitary regulations for all occupations.[49]

Most of the orders contain regulations governing minimum wages for experienced women and minor workers, for inexperienced women and minor workers or learners, for part time workers or learners, and provisions governing keeping of records, filing reports, inspection by the Commission, and maximum hours.[50]

The District of Columbia minimum wage law which was held unconstitutional in 1923[50a] was of the same type as California's. Accordingly, it was justly felt that if put to the test the California statute would be held unconstitutional. Although effort was made to enforce the law no case was carried to court.[51] The

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[35]Sec. 1194. The last phrase might indicate that an employee could not waive his or her rights to recover the minimum wage. It has so been held in other states. *City of Glendale v. Coquat*, 46 Ariz. 478, 52 Pac. (2d) 1178, 102 A. L. R. 837 (1935); *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037 (1918). See, however, *Rush v. Newby*, 171 Tenn. 127, 100 S. W. (2d) 989 (1937); *Thebault v. National Teal Co.*, 198 Minn. 246, 269 N. W. 466, 107 A. L. R. 702 (1936); *Hurt v. Edgell*, 147 Kan. 234, 75 Pac. (2d) 834 (1938); *U. S. v. Golder* (D. C. Pa.) 11 F. Supp. 870 (1935). With respect to waiver of maximum hours, it has been held that statutes like California's eight hour law cannot be waived. *Short v. Bullion-Beck C. Min. Co.*, 20 Utah 20, 57 Pac. 720, 45 L. R. A. 603 (1899); *Montgomery Ward & Co. v. Lusk* (Tex. Civ. App.) 52 S. W. (2d) 1110 (1932).

In *Peterson v. Clarence T. Brown & Co.*, 91 A. C. 43 (1922) it was held that where a woman received an actual wage less than the minimum wage she was entitled to disability indemnity upon basis of minimum wage rather than actual wage.

[36]Sec. 1195.
[37]Sec. 1199.
[38]Order No. 5.
[39]Order No. 11a.
[40]Order No. 7a.
[41]Order No. 6a.
[42]Order No. 8a.
[43]Order No. 15a.
[44]Order No. 12a.
[45]Order No. 10a. See note 26, *supra*, for occupations included in this order.
[46]Order No. 3a.
[47]Order No. 9.
[48]Order No. 16a and Order No. 17.
[49]Order No. 8.
[50]Copies of the orders may be obtained from the Commissioner's office in San Francisco or Los Angeles.
[50a]In *Adkins v. Childrens Hospital, supra*, Note 1.
[51]The same situation existed in other states. See Commons, Andrews, *Principles of Labor Legislation*, 79-80 (1936); Morris, *Oregon's Experience with Minimum Wage Legislation*, (1930) p. 152. One action was started and it was urged that the California law was unconstitutional. The case, *Gainer v. A. B. C. Dohrman et al.*, was dropped before it was reached for argument. See Commons and Associates, *History of Labor Legislation*, p. 515 (1936).

decision in the Adkins cases affected only minimum wages for women; it did not invalidate minimum wages for minors[52] nor the right to prescribe standard conditions of labor.

The Commission's order affecting hotels and restaurants, provides that the minimum wage for a 48 hour week shall be $16; if less than 48 hours per week is worked a specified minimum hourly rate is to be paid.[53] The orders governing the manufacturing industry, the mercantile industry and unclassified occupations[54] each fix a minimum of $16 a week for a "standard week's work." In these orders this term is defined to be "the regularly established number of hours worked per week in the place of employment."

When the codes adopted under the National Industrial Recovery Act were in force the question arose whether an employer, subject to a "standard workweek" order, who adopted a workweek shorter than 48 hours was required to pay $16 per week wages or only a proportionate part of that sum based on a 48-hour week. The Attorney General for California ruled on May 7, 1934 that the minimum wage must be paid even though an employer adopted a workweek shorter than 48 hours. Even so, the Commission unanimously ruled in 1934 that the workweek which should be considered for the purpose of the minimum wage orders was the statutory maximum of 48 hours.[55] Under this ruling an

[52] *Stevenson v. St. Clair,* 161 Minn. 444, 201 N. W. 624 (1925). See Morris, *Op. Cit.* Note 55, pp. 227-228.

[53] Orders No. 36, 39.

[54] Orders No. 11a, 7a, 5 and 9.

[55] *Report of Committee on Minimum Wage Enforcement* of the San Francisco Chapter of the National Lawyers Guild, p. 10. Report is not dated. Copy which is in Los Angeles Public Library contains letter of transmittal dated in February, 1938.

employer was permitted to apply the $16 minimum to a 48-hour week; if a smaller number of hours were regularly worked the minimum wage could be reduced proportionately. Thus, for a 40-hour week the $16 minimum was reduced to $13.33.[56]

This year, Mrs. Margaret L. Clark, new chief of the Division of Industrial Welfare, appointed by Governor Olson, after pointing out that the Commission's ruling conflicted with the 1934 ruling of the Attorney General, obtained a new opinion dated May 20, 1939, from the Attorney General, which affirmed the prior opinion, and said in part "when an employee works a full week for an employer, be that a five-day week or a six-day week, it becomes the duty of that employer so employing to supply the minimum wage required." The Commission on October 20, 1939 voted three to two to abide by its 1934 ruling; however, the chief of the Division sent out notices to all employers stating that the law as interpreted by the Attorney General would be enforced.[57]

THE FAIR LABOR STANDARDS ACT OF 1938

This Fair Labor Standards Act of 1938[58] was enacted by Congress on June 25, 1938.[59] This act creates a Wage and Hour Division in the Department of Labor, directed by an administrator appointed by the President.[60] The administrator is directed to appoint industry committees for each industry engaged in interstate commerce or in the production of goods for commerce, the membership of which shall be composed of an equal number of representatives of the public and employees and employers in the industry.[61]

During the first year of the operation of the act, October 24, 1938 to October 24, 1939, the minimum wage for employees engaged in interstate commerce or in the production of goods for commerce is 25 cents an hour but the administrator may prescribe a rate as high as 40 cents an hour. For six years after October 24, 1939 the minimum rate is 35 cents an hour, subject to the power of the administrator to prescribe rates up to 40 cents an hour. After 1945 the rate is to be 40 cents an hour or a rate not less than 30 cents to be prescribed by the administrator.[62]

Prior to issuing wage orders the administrator is to call industry committees which shall recommend wage rates (which shall not be in excess of 40 cents an hour) and classifications for the respective industries.[63] The administrator, after a hearing, is to approve the recommendations of the industry committee and issue a wage order based thereon, or if he disapproves, to resubmit the matter.[64]

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[56]For criticisms on enforcement of the minimum wage laws in California in 1936 and 1937 see report cited in previous note.

[57]2 *Wage and Hour Rep.* 477 (Nov. 6, 1939). The notice is dated October 1, 1939, refers to the two opinions of the attorney general and states that "effective immediately" the Division will enforce the minimum wage law as set forth in the Commission's orders issued for the mercantile, manufacturing, laundry and dry-cleaning industries and for unclassified occupations. The orders affecting the other industries do not have standard work week provisions.

[58]52 Stat. 1060 (1938) 29 U. S. C. Supp. IV, Sec. 201 (1938).

[59]For a legislative history of the act see Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law and Contemporary Problems, 464 (1939).

[60]Sec. 4a.

[61]Sec. 5 (a) (b) (c).

[62]Sec. 6. No distinction is made between male and female employees in the FLSA.

[63]Sec. 8 (a) (e). Sec. 8 (c) (1) (2) (3) provides what the industry committees shall take into consideration when making recommendations.

[64]Sec. 8 (d).

Section 7 prohibits the employment of any employee engaged in commerce or in the production of goods for commerce for a workweek longer than 44 hours from October 24, 1938 to October 24, 1939; longer than 42 hours from October 24, 1939 to October 24, 1940, and longer than 40 hours thereafter unless compensation at an overtime rate is paid. Exception is made for departure from this schedule for concerns operating under specified bargaining agreements certified by the National Labor Relations Board and for seasonal industries.[65]

No goods may be shipped in interstate commerce which have been produced in an establishment in which oppressive child labor has been employed within 30 days prior to the removal of such products.[66] "Oppressive child labor" is defined as the employment of children under 16 years, except by their parents, or the employment of children between 16 and 18 in hazardous occupations.[67]

The Fair Labor Standards Act makes it unlawful to transport, deliver or sell in interstate commerce, or to ship, deliver or sell with knowledge that shipment, delivery or sale in commerce is intended, any goods in the production of which any employee was employed in violation of sections 6 and 7.[68] It is also unlawful to violate any of the provisions of 6 and 7, to discharge or discriminate against any employee who has complained or testified under the act, to violate the child labor provisions or to violate any provision of section 11 which governs the keeping of records.[69]

A violation of the act is punishable by a fine of not more than $10,000 or imprisonment for not more than six months or both. However, no person is to be imprisoned except for an offense committed after a prior conviction.[70] Employers violating sections 6 and 7 are liable to their employees affected in the amount of unpaid minimum wages, or unpaid overtime, and an additional equal amount as liquidated damages.[71]

It is further provided that no provision of the act shall excuse non-compliance with federal, state or municipal regulations establishing higher wage rates, shorter maximum workweek or higher standards for employment of child labor.[72]

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[65]Sec. 7 (b) (1) (2) (3).

[66]Sec. 12.

[67]Sec. 3 (1).

[68]Sec. 15.

[69]Sec. 15.

[70]Sec. 16 (a).

[71]Sec. 16 (b).

[72]Sec. 18. This brief sketch of the FLSA covers only provisions material here. No attempt is here made to discuss the constitutionality and general operation of the Act. For cases instituted under the Act and for problems and interpretations of the Act see *Wage and Hour Reporter, passim,* and Prentice-Hall Labor Service, Vol. 1.

For discussions of the constitutional questions see Note, *The Federal Wages and Hours Act,* 52 Harv. L. Rev. 646, (1939); Cooper, *Extra Time for Overtime,* 37 Mich. L. Rev. 28 (1938); Stern and Smethurst, *How the Supreme Court May View the Fair Labor Standards Act,* 6 Law and Contemporary Problems, 431, 433, 444 (1939).

The constitutionality of the child labor provisions depends on whether *Hammer v. Dagenhart,* 247 U. S. 251, 62 L. ed. 1101, 38 Sup. Ct. 529 (1918) is to be overruled. The proposed Child Labor Amendment to the Constitution, submitted to the states by Congress in 1924 (43 Stat. 670) has been ratified by 18 states. *2 Wage & Hour Rep.* 284 (June 12, 1939). Eight more ratifications are needed. California ratified it in 1925. (Stats. 1925 p. 1019.) Recently the Supreme Court held that the question whether a state could ratify the amendment after having once rejected it was a political and non-justiciable question. *Coleman v. Miller,* 83 L. ed. (Adv. Op.) 947 (1939).

The FLSA regulates child labor products in interstate commerce. The proposed child labor amendment would extend congressional power to intrastate commerce and agriculture.

In 1939 measures similar to the F.L.S.A. were introduced into 30 state legislatures but not one was adopted.[73] In California, Assembly Bill 167, similar to the federal law was killed in the assembly by a vote of 24 to 51.[74] Not long before the legislature had authorized the Department of Industrial Relations to cooperate with the Wage and Hour Division and the Federal Children's Bureau in the enforcement within the state of the provisions of the Fair Labor Standards Act.[75]

RELATIONSHIP OF THE STATE AND FEDERAL ACTS.

As stated the F.L.S.A. provides[76] that no provision of the act or of an order thereunder shall excuse non-compliance with any federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the act or a maximum workweek lower than the maximum workweek established under the act and that the child labor provisions shall not excuse non-compliance with any federal, state or municipal law establishing a higher standard than the standard imposed under the act.

One question is whether the California laws imposing lower or identical standards are continued in force. So far as employees engaged in interstate commerce are concerned Congress can enact legislation supplanting state laws on the same subject.[77] There is some doubt whether the same rule would apply to those engaged in the production of goods for commerce.

As previously noted in California the maximum hours of labor for women and minors in many industries is 48 hours; the present maximum workweek, without the payment of overtime, under the F.L.S.A. is 42 hours. The question is whether the 48 hour provision is a workweek lower than the maximum workweek under the F.L.S.A. The only maximum workweek under the F.L.S.A. which is effective at this time is the 42 hour week but the act does not prohibit longer hours if time and one-half are paid. It has been argued that to hold that a state law forbidding work in excess of a specified number of hours established a lower maximum workweek than that established by the F.L.S.A. would make the phrase "maximum workweek" in the F.L.S.A. meaningless; that the language of section 18 is so strong that the courts may be compelled to hold that section 7 (b) establishes a 42 hour "maximum workweek" with the privilege of overtime.[78] However, the unofficial construction of section 18 by the Wage and Hour Division is that no provision of the F.L.S.A. excuses non-compliance by an employer with a state law which places an absolute limitation upon the number of hours an employee may work during a workweek.[79]

It has been pointed out in this article that some of the orders of the California Industrial Welfare Commission provided for a $16 minimum wage for a 48 hour week, or an hourly rate of 33-1/3 cents. This rate, of course, is higher

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[73] 2 *Wage & Hour. Rep.* 493.

[74] *Assembly Daily Journal*, May 10, 1939, p. 1953.

[75] Stats. 1939, Chap. 44. The purpose of this statute is to enable the Division of Industrial Welfare to accept money from the Federal Government to aid in the enforcement of the FLSA.

[76] Sec. 18.

[77] *Northern Pac. Ry. v. Washington, ex rel. Atkinson*, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160 (1912); *Erie R. R. v. New York*, 233 U. S. 671, 58 L. ed. 1149, 34 Sup. Ct. Rep. 756 (1914).

[78] 52 Harv. L. Rev. p. 677 (1939).

[79] *Prentice-Hall Labor Service*, Par. 11,417. The administrator of the FLSA has not been given power to enact regulations construing the act.

than the 30 cent rate applicable at the present time under the F.L.S.A., during the first 42 hours. It has been said that since beyond 42 hours, the hourly rate established under the state law is obviously less than the 45 cent minimum established by the F.L.S.A. for overtime the latter rate would apply if the federal and state laws can be so combined.[80] However, the higher rate for overtime would seem to be not the 45 cent minimum but a minimum of one and one-half times the regular state minimum or 50 cents; this would seem to be true because section 7 of F.L.S.A. provides that beyond 42 hours the employee must receive one and one-half times the regular rate at which he is employed; and if he is employed at 33-1/3 cents an hour he should receive one and one-half times that rate, or 50 cents an hour, for his overtime.[81]

Commission orders establishing a $16 minimum for a "standard workweek" are in a slightly different category if the standard workweek is less than 48 hours. If the employer adopts a 42 hour week to avoid the necessity of paying overtime under the F.L.S.A. he would, as has been previously pointed out, have to pay the $16 minimum or an hourly rate of 38 cents an hour until the federal rate become the higher.

It is possible for an employer to be subject to the provisions of both the state and federal law. If he violates both acts an employer could be subject to successive prosecutions by both state and federal officials.[82]

From the point of view of the penalty which an employee may recover under the terms of the F.L.S.A. it is important to consider the statute of limitations applicable. The F.L.S.A. prescribes no limitation. Where a federal statute sets no limitation for an action authorized by it, the statute of limitations of the state in which the action is brought is controlling.[83] In California it has been held that where a statute authorized the recovery of a stated amount for non-compliance with its provisions the amount may constitute a "penalty" although termed "liquidated damages."[84] If this be so the limitation would be one year.[85]

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[80]52 Harv. L. Rev. p. 678 (1939). This is not an exact statement of the argument there made. Different hours and rates have been substituted to bring the argument up to date.

[81]This interpretation is in accord with the unofficial interpretation of the Wage and Hour Division. *Prentice-Hall Labor Service*, Par. 11,417.

The attorney general for California ruled on March 29, 1939, that where the state rate was lower than that provided by the FLSA the requirements of the latter should be met where employees are engaged in interstate commerce or in the production of goods for commerce. See *Prentice-Hall Labor Service*, Par. 11,438.

[82]Cf. *U. S. v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. Rep. 141 (1933); *Ex parte Pratt*, 83 W. Va. 51, 97 S. E. 301 (1918).

[83]*McClaine v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. Rep. 410 (1905); *Forrest v. Jack*, 249 U. S. 158, 79 L. ed. 829, 55 Sup. Ct. Rep. 370, 96 A. L. R. 457.

[84]*Hansen v. Vallejo Electric Light & Power Co.*, 182 Cal. 492, 188 Pac. 999 (1920).

[85]Calif. Code Civ. Prac. Sec. 340 (1).